

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
G & R MACHINERY & EQUIPMENT CO., INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through November 30, 1985.	:	

Petitioner, G & R Machinery & Equipment Co., Inc., 155 Chandler Street, Buffalo, New York 14207, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through November 30, 1985 (File No. 804590).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on July 26, 1988 at 9:15 A.M. Petitioner appeared by Raichle, Banning, Weiss & Stephens (Arnold Weiss, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioner has shown reasonable cause and an absence of willful neglect in failing to file returns and pay tax, thus warranting the abatement of penalty imposed pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

1. On March 13, 1987, following an audit, the Audit Division issued to petitioner, G & R Machinery & Equipment Co., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$9,467.00 in tax due, plus penalty of \$2,312.30 and interest of \$3,006.99 for the period March 1, 1983 through November 30, 1985.

2. Petitioner did not protest the tax assessed in the notice of determination, but did file a petition seeking abatement of penalty assessed in the notice.

3. Petitioner has been in existence since 1948 and is engaged in the business of buying and selling various kinds of machinery and equipment. Its customers are primarily other businesses.

4. The deficiency herein consisted of three components. First, the Audit Division determined \$7,595.00 in tax due resulting from unsubstantiated exempt sales. Second, the Audit Division determined \$1,612.00 in tax due from certain flea market sales. Finally, the Audit Division found \$260.00 in tax due on certain recurring purchases made by petitioner.

5. With respect to the unsubstantiated exempt sales component of the audit, petitioner

consented to the use of a test period analysis. The test period selected was January 1, 1985 through November 30, 1985. Additional taxable sales found within the test period were \$33,380.00 and gross sales during the test period were \$1,163,954.00. The resulting error rate of 2.87 percent was then applied to petitioner's gross sales throughout the audit period. This computation resulted in an assertion of \$7,595.00 in additional tax due.

6. Additional taxable sales of \$33,380.00 for the test period consisted of 14 separate sales made by petitioner which were denied tax exempt status by the Audit Division due to a lack of substantiation. One of these transactions was the sale of a forklift by petitioner for \$16,500.00. The purchaser in that transaction supplied petitioner with a tax identification number which petitioner interpreted as qualifying the purchase in question as tax exempt. The purchaser also advised petitioner that it would pay sales tax on the forklift directly to the State. Petitioner subsequently attempted to resolve the situation by continuing to inquire as to the exempt/non-exempt status of the purchase. Finally, petitioner demanded payment from the purchaser of the sales tax due on the sale.

7. With respect to the flea market component of the audit, the Audit Division determined that petitioner had made sales at a local flea market starting in January 1985. These sales were determined not to have been reported on either petitioner's books or on its sales tax returns. The Audit Division then estimated petitioner's gross flea market sales for 1985 by estimating the cost of operating the flea market booth and adding a profit of \$100.00 per week. This resulted in additional tax due of \$1,612.00 from petitioner's flea market sales.

8. Petitioner's former president, Mr. Donald Rosen, maintained a booth at a local flea market in 1985 where he displayed a certificate of authority to collect sales tax. The certificate bore petitioner's name.

9. With the exception of the flea market sales, petitioner maintained adequate books and records.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1)(i) (as amended by L 1985, ch 65, § 86) provides for the imposition of penalty upon persons who fail to timely file a return or timely pay any tax under Articles 28 and 29. Tax Law § 1145(a)(1)(iii) (as renum by L 1985, ch 65, § 86) provides for the remission of all or part of such penalty if the failure to pay was due to reasonable cause and not due to willful neglect.

B. Petitioner has shown that its failure to report and pay over the tax assessed in respect of the disallowed exempt sales was due to reasonable cause and not due to willful neglect. Petitioner made an extensive effort to ascertain the exempt/non-exempt status of the forklift sale (Finding of Fact "6"). Such an effort is indicative of reasonable cause and good faith (see ___, 20 NYCRR 536.5[d][2]). With respect to the remaining disallowed exempt sales, such sales amounted to only about 1.4 percent of petitioner's gross sales during the test period. This degree of failure in reported taxable sales is de minimis in nature, and in light of petitioner's volume of sales and its maintenance of adequate books and records, is also reasonable. Accordingly, the Audit Division is directed to cancel that portion of the penalty herein assessed in respect of the disallowed exempt sales found on audit.

C. Petitioner failed to show reasonable cause for its failure to report and pay over the tax

assessed on its flea market sales and its recurring purchases. Petitioner contended that any flea market sales were made by its former president as an individual and not on behalf of the corporation. This contention is unsupported by the record (Finding of Fact "8"). Petitioner presented no other evidence of reasonable cause with respect to the flea market sales. As for the recurring purchases, petitioner presented no evidence to support its position that its failure to pay tax on this component of the audit was due to reasonable cause and not willful neglect.

D. The petition of G & R Machinery & Equipment Co., Inc. is granted to the extent indicated in Conclusion of Law "B" and the Audit Division is directed to recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 13, 1987, in accordance therewith. The petition is in all other respects denied.

DATED: Albany, New York
December 1, 1988

/s/ Timothy J.

Alston _____
ADMINISTRATIVE LAW JUDGE